

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 05-0177**  
**Use Tax**  
**For the Years 2001 through 2003**

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**ISSUE**

**I.     Advertising Materials – Use Tax.**

**Authority:**     IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-3-5(a); 45 IAC 2.2-3-16; Ky. Rev. Stat. Ann. § 139.310.

Taxpayer challenges the audit's decision imposing Indiana use tax on the cost of various advertising materials purchased by taxpayer for use within Indiana.

**STATEMENT OF FACTS**

Taxpayer is an Indiana corporation organized to operate a franchise restaurant located in Indiana. Taxpayer is co-owned by an Indiana resident and by a Kentucky resident. The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit review resulted in the assessment of additional Indiana use tax. Taxpayer disagreed with the assessment and lodged a protest to that effect. Declining the opportunity to take part in an administrative hearing on the matter, taxpayer agreed to permit resolution of the protest based upon the contents of its written submission to the Department. This Letter of Findings results.

**DISCUSSION**

**I.     Advertising Materials – Use Tax.**

The Department's audit concluded that taxpayer owed use tax on the price of advertising materials destined for use within Indiana. Taxpayer disagrees.

The restaurant franchisor prepared advertising materials suitable for use by its individual franchisees. Taxpayer – as one of the individual franchisees – took advantage of these materials using them to promote taxpayer's Indiana restaurant business.

In taxpayer's case, the franchisor's support service ships the materials to a Kentucky mail service. According to taxpayer, "The title of these inserts is assumed by [taxpayer] or its designee in Kentucky. The mailer then adds the coupons/flyers to its other inserts and mails them to various locations in the state of Indiana." Taxpayer thereafter pays franchisor for the cost of the advertising materials. The audit based the use tax assessment on the cost of the advertising materials delivered into Indiana.

Taxpayer points out that it remitted Kentucky sales tax each time it paid an invoice for the advertising materials. Taxpayer contends that the proposed assessment of Indiana use tax “would result in double taxation at the Indiana franchisee level and would appear to violate the fundamental constitutional principals against double taxation.”

Indiana imposes a use tax on the “storage, use, or consumption of tangible personal property in Indiana . . . regardless of the location of that transaction or of the retail merchant making that transaction.” IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-3-1. However, IC 6-2.5-3-5(a) provides:

A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

The imposition of the use tax, on purchases occurring outside the state, is qualified under IC 6-2.5-3-5(a). The Department’s regulation, 45 IAC 2.2-3-16, reiterates the principal stating that a credit shall be given for “the amount of any sale, purchase, or use tax paid to any other state . . . with respect to the tangible personal property on which Indiana use tax applies.”

Taxpayer has provided approximately 25 original invoices indicating that that taxpayer paid Kentucky sales tax on the purchase of advertising materials which were sent into and used in Indiana. It is taxpayer’s contention that it is entitled to a credit against the Indiana use tax assessment; taxpayer errs.

It is the Department’s conclusion that the IC 6-2.5-3-5(a) use tax credit is not available when the corresponding out-of-state sales tax was imposed in error. Ky. Rev. Stat. Ann. § 139.310 states that the Kentucky use tax “is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased . . . for storage, use, or other consumption *in this state . . .*” (*Emphasis added*). The Indiana use tax law states that the Indiana use tax is imposed on the “storage, use, or consumption of tangible personal property *in Indiana . . .*” IC 6-2.5-3-2. (*Emphasis added*). Although the advertising materials were prepared in and sent from Kentucky, the materials were *used* in Indiana. The Kentucky use tax is inapplicable while the audit’s assessment of Indiana use tax was entirely appropriate.

Taxpayer’s double taxation fears are not entirely unwarranted. However, the solution is not to gloss over the undisputed fact that the advertising materials were used in Indiana, but for taxpayer to seek a refund of the taxes paid to Kentucky in error.

### **FINDING**

Taxpayer’s protest is respectfully denied.